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May 8, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**BY HAND DELIVERY**

William F. Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL


Re: In the Matter of the Provision of Interstate and International  
Interexchange Telecommunications Service Via the "Internet"  
by Non-Tariffed, Uncertified Entities - RM - 8775

Dear Mr. Caton:

Please find enclosed for filing the original and four (4) copies of the Opposition of Microsoft Corporation to the Petition of America's Carriers Telecommunication Association ("ACTA") for Declaratory Ruling, Special Relief, and Institution of Rulemaking Against VocalTec, Inc., Internet Telephone Company, Third Planet Publishing Inc., Camelot Corporation, Quarterdeck Corporation, and Other Providers of Non-Tariffed and Uncertified Interexchange Telecommunications Services.

If you have any questions or need any additional information please feel free to contact me.

Sincerely yours,

  
Stanley M. Gorinson

Enclosure

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cc: Chairman Reed E. Hundt  
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Commissioner Susan Ness  
Commissioner James H. Quello  
Wanda Harris  
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International Transcription Services, Inc.  
America's Carriers Telecommunication Association

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**BEFORE THE  
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WASHINGTON, D.C.**

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**IN THE MATTER OF:**

**THE PROVISION OF INTERSTATE AND  
INTERNATIONAL INTEREXCHANGE  
TELECOMMUNICATIONS SERVICE VIA THE  
"INTERNET" BY NON-TARIFFED, UNCERTIFIED  
ENTITIES**

**AMERICA'S CARRIERS TELECOMMUNICATION  
ASSOCIATION ("ACTA"),  
Petitioner**

**PETITION FOR DECLARATORY RULING,  
SPECIAL RELIEF, AND  
INSTITUTION OF RULEMAKING AGAINST:**

**VocalTec, Inc.; Internet Telephone Company;  
Third Planet Publishing Inc.; Camelot Corporation;  
Quarterdeck Corporation; and Other Providers of  
Non-Tariffed and Uncertified Interexchange  
Telecommunications Services,  
Respondents.**

**RM - 8775**

**OPPOSITION OF MICROSOFT CORPORATION TO PETITION**

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**May 8, 1996**

**Attorneys for Microsoft Corporation**

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

**IN THE MATTER OF:**

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**OPPOSITION OF MICROSOFT CORPORATION TO PETITION**

**I. SUMMARY OF POSITION**

Microsoft Corporation, by its attorneys, hereby submits its opposition to the petition filed by America’s Carriers Telecommunications Association (“ACTA”). The ACTA petition complains of companies selling software for the purpose of permitting Internet users to engage in voice communications (ACTA Petition at 3) and requests the Commission to (1) declare that it has the authority to regulate interstate and international telecommunications services using the Internet; (2) order all Internet voice services suspended until the Commission has had sufficient

time to conclude a rulemaking; and (3) institute a rulemaking to govern the provision of telecommunications services over the Internet. ACTA states these actions are essential because “[r]espondents make a one time charge for software, but users incur no other charges for making local or long distance calls to any other ‘Internet Phone’ user in the world.” (ACTA Petition at 3). ACTA terms this “unfair competition.” (*Id.* at 4).

We oppose each of ACTA’s requests. The ACTA complaint does not invoke Commission jurisdiction and more fundamentally, as we discuss below, would be at odds with the clear goals of the President and the Congress as expressed in the Telecommunications Act of 1996 (the “Act”) to permit the marketplace rather than regulators to determine how services should be offered to meet consumer demand. It also would be contrary to the Commission’s policy of forbearing from regulating information services. In any event, in this instance, ACTA’s complaints, at most, deal with an incidental use of the Internet. Because it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” (1996 Act § 509, adding 47 U.S.C. § 230(b)(2)), the Commission should and must deny this Petition.

## **II. STATEMENT OF INTEREST**

Microsoft Corporation is a developer of applications and operating systems software for personal computers. Within the last year, Microsoft has added numerous Internet enhancements to its existing client and server products, development tools, applications, and content titles. In August 1995, Microsoft launched an Internet online service, The Microsoft Network (“MSN”), which offers Internet access, premium content, e-mail and a variety of educational and

entertaining forums. In addition to the online service, which is available to subscribers, MSN is also a site on the World Wide Web.

Microsoft and other software providers have thrived in an unregulated environment. Given the freedom to innovate, the software industry has been consumer-driven with very short product cycles, and, as a result, the United States is the world leader in this industry. Accordingly, Microsoft has a strong interest in any potential regulation of the Internet or software developed to enable or enhance Internet applications.

### III. DISCUSSION

A. **The Primary Goal Of The Telecommunications Act Of 1996 Is To Foster Competition By Deregulating The Telecommunications Industry; Regulation Of The Internet Is Contrary To That Goal.**

As stated in the Joint Explanatory Statement of the Committee of the Conference, the Telecommunications Act of 1996 is intended “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>1</sup> It would be highly ironic if one of the Commission’s first actions after passage of this pro-competitive statute was to regulate the now unregulated world of the Internet.

Accordingly, assuming it had jurisdiction to do so, the Commission should not exercise regulatory power absent a market failure that requires active government intervention. No such failure has been demonstrated. An assertion of regulatory power could have significant adverse effects on the development of the Information Superhighway. That development has been based,

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<sup>1</sup> Opening Paragraph of the Act’s Joint Explanatory Statement.

to date, on unfettered freedom to pursue creative solutions for consumer and business needs. The U.S. software industry is the world leader precisely because of its ability to quickly respond to users' demands. In fact, "[t]he success of the Internet has been the fact that government has kept its mitts off of it . . . ."<sup>2</sup> Government intervention at a time when no need for that intervention has been demonstrated may undermine a principal goal of the information revolution – more choice.

For example, *In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards Or the Imposition of a Moratorium on Non-Federal Standards*, 46 F.C.C. 2d 175, 176 (1974), the Commission addressed this complicated issue of regulatory expectations finding that "[o]ver-expectation and anticipatory regulation can be just as damaging, if not more damaging, than no regulation at all." Indeed, regulation in anticipation of future developments may undermine present innovation. The Commission was aware of that significant probability more than 20 years ago: "We are concerned that we do not, in our efforts to mold the communications structure of the future, unduly hamper the developing structure of today." (*Id.*) Thus, regulating any part of the Internet could lead to a stifling of the creativity that has defined the Internet.

ACTA cites *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), for the proposition that the Commission can assert jurisdiction to maintain the "status quo" – although regulation of software would hardly be the status quo. Indeed, it would be a regulatory disaster. In *Southwestern Cable*, the Commission protected broadcasting at the expense of cable. That

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<sup>2</sup> Statement of Commissioner Chong, *Hearing On The Federal Communications Commission*, U.S. House of Representatives, Subcommittee on Telecommunications and Finance, Committee on Commerce at 100 (March 27, 1996) (the "Hearing On The Commission").

decision is from an earlier regulatory era – an era the 1996 Act was clearly intended to end – in which the Commission chose which technologies would be winners and losers. The Commission ultimately abandoned its efforts to protect broadcasters by retarding cable growth. It should not begin another experiment in needless and destructive market regulation now.

In fact, the Commission itself is one of the primary nurturers of the Internet.<sup>3</sup> The Commission determined that it had jurisdiction over and could, **but should not**, regulate enhanced or information services<sup>4</sup> under Title II of the 1934 Act. As a consequence, the information services industry has flourished with a minimum of regulation. Thus, even if the Commission determined it had jurisdiction, it should adhere to its *Computer II* precedent and choose to forbear from regulating the Internet.

Congress provided the Commission with express authority to forbear from regulating telecommunications carriers and telecommunications services as long as such regulations are not necessary to protect consumers, to protect the public interest and to ensure that charges, practices, classifications or regulations are just and reasonable and not unjustly or unreasonably discriminatory. (Section 401 of the Act).<sup>5</sup> Clearly consumers and the public interest would be well-served by forbearance from regulation of Internet services.

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<sup>3</sup> Statement of Chairman Hundt, *Hearing On The Commission* at 98.

<sup>4</sup> *Computer II, Final Decision*, 77 F.C.C.2d 384, modified on reconsideration, 84 F.C.C.2d 50 (1980), further modified on reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190 (released May 4, 1984).

<sup>5</sup> The Commission is actively pursuing forbearance where appropriate. *See, e.g.*, Notice of Proposed Rulemaking In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61 (March 25, 1996).

**B. The Commission Should Not Regulate The Providers Of Internet Telephony Services As They Are Not “Telecommunications Carriers” Providing “Telecommunications Services.”**

The 1996 Act gives a statutory predicate to the Commission’s efforts to make the telecommunications industry ever more competitive. However, the Commission’s jurisdiction, while broad, is still limited by the statutory framework. The ACTA petition simply ignores the limitations of that framework. “Telecommunications” is defined under the 1996 Act as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” (1996 Act § 3(a)(2), adding 47 U.S.C. 153(48)). A “Telecommunications Carrier” is a provider of telecommunications services – *i.e.*, the offering of telecommunications **for a fee directly to the public**, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” (1996 Act § 3(a)(2), adding 47 U.S.C. 153(49) (emphasis supplied)).

The Internet does not easily fit these definitional niches. Internet traffic depends on use of telecommunications, but the providers of those switched and leased circuits are traditional telecommunications carriers. Internet Service Providers (ISPs) merely provide access to the Internet and may also offer content themselves – *e.g.*, MSN. Other segments of the Internet are similar to information services that the Commission is familiar with and has traditionally avoided regulating – *e.g.*, pure content providers and software developers – as well as hardware manufacturers. The combination of these various segments does not suddenly create a new need for regulation, especially regulation of the vibrantly competitive software market. Indeed, in those instances where Congress specifically focused on the Internet, it made clear that regulation of the type ACTA seeks was to be precluded. For example, Section 502 of the 1996 Act, which adds Section 223 to the Communications Act dealing with obscene or harassing use of

telecommunications facilities, specifically and explicitly states, “[n]othing in this Section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.” (New § 223(e)(6)). The 1996 Act defines interactive computer services to include “specifically a service or system that provides access to the Internet . . . .” (1996 Act § 509, adding 47 U.S.C. § 230(e)(2)). Moreover, Congress declared, as noted previously, that it was the policy of the United States **“to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation.”** (1996 Act § 509, adding 47 U.S.C. § 230(b)(2) (emphasis supplied)).

The Internet is generally a packet switched data network (1996 Act § 509, adding 47 U.S.C. § 230(e)(1)) based on the concept that “bits are bits”, regardless of their application: data, voice, video, or any other. The software at the sending and receiving ends interprets the instructions accompanying or within the bits to reassemble the information in the form desired by the sender. Regulating Internet phone service or the software enabling the user to have this or any other capability would require the Commission to establish some method of monitoring the user’s transmissions to the Internet and determining when they constitute real-time voice transmission. Functioning as the “bit police” is practically impossible and is a role the Commission cannot fulfill in any realistic manner.

Finally, this service is not telecommunications offered directly to the public for a fee. In general, most users make a one-time purchase of the hardware and software necessary to use the Internet for this limited voice use. Often online service providers will give the software away **for free** as an inducement to use their service. As noted previously, ACTA openly concedes this essential point. (ACTA Petition at 3-4). This does not meet the definition of a telecom-

munications service and an assertion of jurisdiction would be improper. The user will not pay the Internet Service Provider and the Internet Service Provider will not pay their telecommunications carriers any more or less regardless of whether the individual takes advantage of Internet voice capability.

Accordingly, the simplest way of dealing with the issue presented is to declare that the Internet does not fit the definitions and to decline to regulate for either policy or legal reasons.

#### IV. CONCLUSION

Microsoft urges the Commission to refrain from seeking to regulate the Internet voice services and to deny ACTA's Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking. The Internet is a constantly changing medium and should remain free from regulation so that it may develop to its full potential.

Respectfully submitted,

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